WILKINSON) BARKER) KNAUER) LLP

2300 N STREET, NW
SUITE 700
WASHINGTON, DC 20037
TEL 202.783.4141
FAX 202.783.5851
www.wbklaw.com
PAUL J. SINDERBRAND
psinderbrand@wbklaw.com

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Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands* – WT Docket No. 03-66 – **WRITTEN EX PARTE PRESENTATION**

Dear Ms. Dortch:

In its *Further Notice of Proposed Rulemaking* ("*FNPRM*") in the above-referenced proceeding, the Commission solicited comment on whether performance tests should be applied to Broadband Radio Service ("BRS") and Educational Broadband Service ("EBS") licensees and, if so, what tests should be applied.[1] I am writing on behalf of the Wireless Communications Association International, Inc. ("WCA") to supplement its response to that inquiry and alert the Commission to precedent supporting WCA's position.

In its comments in response to the *FNRPM*, WCA called for the Commission to apply to BRS and EBS licensees the traditional Part 27 "substantial service" test, using the same safe harbors it generally employs, but augmented by two additional safe harbors designed to accommodate the unusual circumstances facing BRS and EBS licensees.[2] Under the second of WCA's proposed safe harbors, a BRS or EBS licensee would be entitled to a finding of substantial service with respect to the first substantial service showing submitted after the effective date of the new rules if the licensee demonstrates that it met a safe harbor at any time

[1] *See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Band*, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 14165, 14282-88 (2004) ["*Report and Order and FNPRM*"].

[2] *See* Comments of Wireless Communications Ass'n Int'l, Inc., WT Docket No. 03-66, at 12-13 (filed Jan. 10, 2005) ["WCA Comments"].

during the license term.[3] Thus, for example, a licensee that was providing a commercial video service that reached more than 20% of the population of its service area during its license term, but then discontinued that service in contemplation of converting to a two-way wireless broadband service, would be deemed to have provided substantial service, even if its new service offering has not met the 20% coverage benchmark at the moment its substantial service showing is filed.

It is not surprising that WCA's proposal drew substantial support from those participating in this proceeding – commercial system operators and educators alike.[4] Indeed, only one entity has opposed WCA's proposal. While it is asserted that WCA's proposal "is antithetical to the Commission's goals in this proceeding and the public interest," [5] nothing could be further from the truth. To the contrary, WCA's proposal is fully consistent both with the Commission's objectives in WT Docket No. 03-66 and its overall approach to evaluating licensee performance.

As WCA has previously noted, its approach comports with the Commission's general policy supporting the transition from legacy video to wireless broadband services in the band.[6] The Commission has made crystal clear that it desires to eliminate any false incentives for the preservation of legacy video systems:

> [a]s part of the fundamental changes to the BRS and EBS band, we seek to encourage BRS and EBS licensees to respond to market demands for next generation ubiquitous broadband wireless services and make investments in the future of such services. We believe this goal cannot be readily accomplished if BRS and EBS licensees have to focus their resources on preserving legacy services solely because renewal approaches and licensees fear losing their authorizations if the discontinuance of service and forfeiture rules are not eliminated. Furthermore, the move to next generation services for BRS and EBS providers also entails a transition period where licensees will be forced to go dark and discontinue service during the actual transition. Accordingly, we conclude

[3] *Id.* at 13.

[4] *See, e.g.,* Comments of BellSouth Corp. *et al*., WT Docket No. 03-66, at 10-11 (filed Jan. 10, 2005); Joint Reply Comments of the Catholic Television Network and National ITFS Ass'n, WT Docket No. 03-66, at 8 (filed Feb. 8, 2005) ("[s]everal safe harbors were proposed . . .. All of these safe harbors make sense, given the present uncertainty of how the band will be used following transition."); Reply Comments of Illinois Institute of Technology, WT Docket No. 03-66, at 10-12 (filed Feb. 8, 2005); Reply Comments of The ITFS/2.5 GHz Mobile Wireless Engineering & Development Alliance, Inc., WT Docket No. 03-66, at 5 (filed Feb. 8, 2005); Reply Comments of Independent MMDS Licensee Coalition, WT Docket No. 03-66, at 4-5 (filed Feb. 8, 2005).

[5] Reply Comments of Clearwire Corp., WT Docket No. 03-66, at 13 (filed Feb. 8, 2005).

[6] *See* WCA Comments at 13-14.

that it would be inappropriate to penalize BRS and EBS licensees while they migrate to the new band plan.[7]

As the Commission considers this issue, it should keep in mind that in evaluating substantial service showings by licensees in other services, the Commission has consistently credited licensees with facilities that had been operated during the license term but had been dismantled as of the date on which the substantial service showing was made. For example, in *Biztel, Inc.*, the former Public Safety and Private Wireless Division of the Wireless Telecommunications Bureau found that a 39 GHz licensee had satisfied the "four links per million population" safe harbor benchmark despite the fact that some of the links considered had been dismantled because they were no longer necessary to meet customer demand.[8] Similarly, in *Winstar Wireless Fiber Corp.*, the Division recognized that in evaluating substantial service showings, it should consider facilities that had been dismantled in response to evolving consumer needs.[9] While these two cases arose under circumstances different from that facing BRS and EBS licensees, the general principle is the same – *a licensee should be entitled to a substantial service finding where the licensee has legitimate reasons for dismantling facilities that had satisfied a safe harbor benchmark.*

Pursuant to Section 1.1206(b)(1), this notice is being filed electronically with the Commission via the Electronic Comment Filing System for inclusion in the public record of the above-reference proceeding. Should you have any questions regarding this presentation, please contact the undersigned.

Respectfully submitted,

/s/ *Paul J. Sinderbrand*
Paul J. Sinderbrand

Counsel to the Wireless Communications Association International, Inc.

cc: Fred Campbell
John Branscome
John Giusti
Barry Ohlson

[7] *Report and Order and FNPRM*, 19 FCC Rcd at 14254 (citations omitted).

[8] *See Biztel, Inc*., Memorandum Opinion and Order, 18 FCC Rcd 3308, 3310-11 (2003).

[9] *See Winstar Wireless Fiber Corp.*, Memorandum Opinion and Order, 18 FCC Rcd 24674, 24684 (2003).

Catherine Seidel
Uzoma Onyeije
Joel Taubenblatt
John Schauble